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Manoharan a/l Perumal & Anor v Cheong Chow Hua (suing as widow of Edward Lim Chee Keong, deceased) & Ors

B COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-04–125–05 OF 2014
ZAHARAH IBRAHIM, ALIZATUL KHAIR AND TENGKU MAIMUN JJCA
10 FEBRUARY 2015

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Damages — Fatal accident — Loss of support — Claim — Deceased resigned from company four days before death — Whether deceased could said to be earning at time of accident and death — Whether there was evidence that deceased earned alleged amount of money — Civil Law Act 1956 s 7

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The first, second and third respondents were the wife and children of the late Edward Lim ('the deceased'), respectively. The fourth respondent was the deceased's mother. Following the death of the deceased in a road traffic accident, the respondents ('the plaintiffs') claimed against the defendants in the sessions court for damages pursuant to s 7 of the Civil Law Act 1956 ('the Act'). The sessions court judge found the defendants 100% liable for the accident. The plaintiffs' claim for loss of support was however dismissed. Aggrieved by the dismissal of the said claim, the plaintiffs appealed to the High Court and the appeal was allowed. The plaintiffs were awarded sums for a period of seven years. Hence, the present appeal. The appellants ('the defendants') submitted that the High Court failed to consider and evaluate adequately, or at all, the facts: the deceased resigned from SEMS four days before his death and was therefore not earning at the time of the accident and death; as at the date of the death, the deceased was not a partner of SEMS; the SEMS's contracts with MITSUI were both a lump sum contract ie a one off contract and/or that SEMS received no new contracts in 2009; the two MODEC contracts, at best, grossed USD2,000 (RM6,000) per month; the deceased worked as an employee with Jutasama at the time of his death and that Jutasama was in the same business as that of SEMS; and the plaintiffs led no evidence that the deceased earned RM30,000 per month.

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Held, allowing the appeal with no order as to costs:

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(1) The High Court judge failed to consider that the deceased was an employee of Jutasama at the time of the accident. The plaintiffs' claim for loss of support premised on the purported income of the deceased from the partnership of SEMS was misconceived when in actual fact, the deceased was earning from Jutasama at the material time. If at all there was a claim for loss of support under s 7 of the Act, the plaintiffs' claim

ought to have been made for loss of earnings of the deceased from his employment with Jutasama, which the plaintiffs have failed to do. The deceased's loss of earnings had consequently not been proven by the plaintiffs (see paras 10–11).

(2) The deceased had resigned from the partnership four days prior to his death. The deceased had ceased to earn from the partnership. Therefore, there was no basis to allow the earnings of the deceased from the partnership for the next seven years (see para 12).

(3) The High Court erred in law and in fact in allowing the plaintiffs' claim for loss of support premised on the earnings of the deceased from the partnership of SEMS. The order of the High Court was set aside and the order of the sessions court was restored (see para 13).

[Bahasa Malaysia summary

Responden-responden pertama, kedua dan ketiga adalah masing-masing isteri dan anak-anak kepada Edward Lim ('si mati'). Responden keempat adalah ibu si mati. Berikutan kematian si mati dalam kemalangan jalan raya, responden-responden ('plaintif-plaintif') menuntut terhadap defendan-defendan di mahkamah sesyen bagi ganti rugi berikutan s 7 Akta Undang-Undang Sivil 1956 ('Akta'). Hakim mahkamah sesyen mendapati defendan-defendan bertanggungjawab 100% bagi kemalangan tersebut. Tuntutan plaintif-plaintif bagi kehilangan penyara walau bagaimanapun ditolak. Tidak puas hati terhadap penolakan tuntutan tersebut, plaintif-plaintif merayu kepada Mahkamah Tinggi dan rayuan dibenarkan. Plaintif-plaintif diawardkan wang untuk tempoh selama tujuh tahun. Maka rayuan ini. Perayu-perayu ('defendan-defendan') berhujah bahawa Mahkamah Tinggi gagal untuk mempertimbangkan dan menilai secara mencukupi, atau apa cara sekalipun, fakta: si mati meletakkan jawatan daripada SEMS empat hari sebelum kematiannya dan oleh itu tidak bekerja pada masa kemalangan dan kematian; kerana pada tarikh kematian, si mati bukan rakan kongsi SEMS; kontrak SEMS dengan MITSUI kedua-duanya kontrak sekaligus iaitu kontrak berlaku sekali sahaja dan/atau bahawa SEMS tidak menerima kontrak-kontrak baru pada tahun 2009; kedua-dua kontrak MODEC, paling baik, memperolehi USD2,000 (RM6,000) sebulan; si mati bekerja sebagai pekerja di Jutasama pada masa kematiannya dan bahawa Jutasama adalah dalam perniagaan yang sama seperti SEMS; dan plaintif-plaintif tidak menunjukkan keterangan yang si mati berpendapatan RM30,000 sebulan.

Diputuskan, membenar rayuan tanpa perintah terhadap kos:

(1) Hakim Mahkamah Tinggi gagal untuk mempertimbangkan bahawa si mati adalah pekerja Jutasama pada masa kemalangan. Tuntutan plaintif-plaintif bagi kehilangan penyara berasaskan atas pendapatan si mati yang dimaksudkan daripada perkongsian dengan SEMS adalah

A salah tanggap apabila sebenarnya, si mati adalah mendapat pendapatan daripada Jutasama pada masa material. Jika sememangnya terdapat tuntutan bagi kehilangan penyara di bawah s 7 Akta, tuntutan plaintif-plaintif patut dibuat untuk kehilangan pendapatan si mati daripada pekerjaan dengan Jutasama, yang mana plaintif-plaintif gagal berbuat sedemikian. Kehilangan pendapatan akhirnya tidak dibuktikan oleh plaintif-plaintif (lihat perenggan 10–11).

(2) Si mati telah meletakkan jawatan daripada perkongsian empat hari sebelum kematiannya. Si mati telah berhenti untuk memperolehi pendapatan daripada perkongsian tersebut. Oleh itu, tidak ada asas untuk membenarkan pendapatan si mati daripada perkongsian bagi tujuh tahun yang akan datang (lihat perenggan 12).

(3) Mahkamah Tinggi tersilap dari segi undang-undang dan fakta dalam membenarkan tuntutan plaintif-plaintif untuk kehilangan penyara berasaskan atas pendapatan si mati daripada perkongsian dengan SEMS. Perintah Mahkamah Tinggi diketepikan dan perintah mahkamah sesyen dikenakan semula (lihat perenggan 13).]

Notes

For cases on fatal accident in general, see 6(1) *Mallal's Digest* (5th Ed, 2015) paras 483–640.

Legislation referred to

Civil Law Act 1956 s 7, 7(3)

Appeal from: Civil Appeal No 12B-516–08 of 2012 (High Court, Shah Alam)

Jadadish Chandra (Arbain & Co) for the appellant.
CC Toh (Toh Chin Chong & Co) for the respondent.

Tengku Maimun JCA (delivering judgment of the court):

[1] The first, second and third respondents/plaintiffs were the wife and the children of the Edward Lim Chee Keong ('the deceased'), respectively. The fourth respondent/plaintiff was the deceased's mother. Following the death of the deceased (aged 41 years old) in a road traffic accident, the plaintiffs filed a claim against the defendants in the sessions court at Klang for damages under s 7 of the Civil Law Act 1956 ('the Act').

[2] The sessions court judge found the defendants 100% liable for the accident. The plaintiffs' claim for loss of support was however dismissed.

[3] Aggrieved by the dismissal of the said claim, the plaintiffs appealed to the

High Court. The learned High Court judge allowed the plaintiffs' appeal. A sum of RM5,000 per month for a period of seven years totalling RM420,000 was awarded to the first, second and the third plaintiffs while the fourth plaintiff was awarded a sum of RM800 per month for a period of seven years amounting to RM67,200.

[4] Before us was the defendants' appeal against the order of the High Court in awarding the above sums to the plaintiffs. We had allowed the appeal. We now give our reasons.

IN THE HIGH COURT

[5] In allowing the plaintiffs' appeal, the learned High Court judge had stated that:

> [4] Kerana ketiadaan alasan penghakiman dari hakim bicara, mahkamah ini mengambil pendekatan meneliti keterangan yang ada dan hujah yang dikemukakan bagi menentukan sama ada keputusan hakim sesyen menolak tuntutan ini boleh dipertahankan atau sebaliknya.
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> [5] Hujahan perayu dalam kes ini adalah mudah iaitu terdapat lebih dari cukup keterangan bagi membuktikan Edward Lim simati semasa hidupnya berpendapatan dalam lingkungan RM30,000 sebulan. Edward Lim memberi RM10,000 kepada plaintif untuk perbelanjaan rumah. Apabila Edward Lim meninggal, plaintif telah kehilangan sumber tanggungan ini. Oleh itu tiada sebab tuntutan ini tidak dibenarkan.
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> [6] Meneliti rekod rayuan menunjukkan, melalui plaintif pertama ('SP7'), Plaintif Kelima ('SP5'), SP3 dan SP4, Plaintif-Plaintif telah membuktikan bahawa Edward Lim, sebelum kematiannya, adalah tuan punya tunggal (sole proprietor) perniagaan SE Management and Service ('SEMS'), yang berniaga dalam sektor minyak dan gas. Keuntungan SEMS telah dibuktikan dengan keterangan dokumentari, eksh D10. Bagi tempoh 1 Januari 2009 sehingga 13 April 2009, keuntungan SEMS adalah sebanyak RM113 ribu lebih.
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> [7] Pada atau lebih kurang bulan April 2009, atas nasihat kawannya yang memberi kontrak kerja-kerja Mitsui Engineering, Japan dan MODEC Inc Japan kepada SEMS, Edward Lim tidak mahu namanya dicerminkan dalam daftar sebagai tuan punya syarikat tersebut.
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> [8] Edward Lim kemudian mengguna nama isteri dan adik perempuannya untuk didaftarkan sebagai rakan kongsi syarikat SEMS pada 1 April 2009. Edward menarik diri dari jadi rakan kongsi pada 9 April 2009.
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> [9] Keterangan selanjutnya menunjukkan bahawa pada semua masa Edward Lim adalah empunya dan pengurus SEMS yang sebenar. Sehingga kematiannya, Edward adalah entrepreneur 'hands-on' syarikat tersebut. Isteri dan adik beliau hanya 'fronting' baginya. Mereka tidak mempunyai apa-apa pengetahuan langsung berhubung perniagaan SEMS. Perkara ini disokong oleh keterangan daripada wakil Am Bank ('SP8') yang menunjukkan bahawa Edward Lim adalah penanda-tangan

tunggal akaun bank syarikat tersebut daripada masa akaun dibuka sehingga hari kematiannya dan voucher pembayarannya bertarikh 13 April 2009 yang telah ditandatangani oleh Edward (disahkan oleh SP3), cek yang berkaitan Cek No 548777 juga telah ditandatangani oleh Edward Lim (telah disahkan oleh pegawai bank SP8).

[10] Keterangan Ms Lai ('SP3') dan Lew Pow Onn ('SP6'), serta eksh P7, P8, & D12 pula membuktikan dengan jelas sumber pendapatan Edward Lim untuk tempoh empat bulan — Januari 2009 hingga April 2009 — adalah RM113,145. Ini bermakna pendapatan Edward Lim adalah RM28,286.25 sebulan (RM113,145.00 + RM28,286.25). Amaun ini termasuk jumlah RM22,000 Remuneration dari SE Management & Services Sdn Bhd (iaitu RM22,000 + 4 = 5,500 sebulan).

[11] Buku-buku akaun SEMS Sdn Bhd telah diaudit oleh firma Chartered Accountants & Auditors Dr Lew Pow Onn, SP6, yang telah memberikan syarikat tersebut 'a clean report'. Ini adalah jelas daripada eksh P14 dan juga dari pengesahan saksi defendan D1, Encik Gerrad.

[12] SP3 juga mengesahkan jumlah cukai pendapatan yang dikenakan adalah RM12,199.80 dan ia telah dibayar (eksh 15). Keterangan yang ada menunjukkan sejak SEMS diambil alih oleh Edward Lim pada 25 Sep 2008 dan menjadi tuan punya tunggal perniagaan SEMS pendapatan mula mengalir masuk ke dalam akaun ini secara besar sejak bulan November 2008 dan dalam tempoh lima bulan (November 2008 sehingga Mei 2009) pendapatan yang diterima daripada pelanggan-pelanggannya di Jepun berjumlah RM1,418,848.27 ...

THE APPEAL

[6] Before us, learned counsel for the defendants submitted that the learned High Court judge had failed to consider and evaluate adequately, or at all, the following relevant facts and evidence:

(a) the deceased had resigned from SEMS on 9 April 2009, ie four days before his death on 13 April 2009 and was therefore not earning at the time of the accident and death;

(b) as at the date of the death, the deceased was not a partner of SEMS;

(c) SEMS's contracts with MITSUI were both a lump sum contract ie a one off contract and/or that SEMS received no new contracts in 2009;

(d) the two MODEC contracts, at best, grossed USD2,000 (RM6,000) per month;

(e) the evidence of the defendant's expert witness ('SD1') that the MITSUI and the MODEC contracts were fixed contracts and that there was no indication of continuity or maintainable revenue coming into the company;

(f) the deceased worked as an employee with Jutasama at the time of his death and that Jutasama was in the same business as that of SEMS; and

(g) the plaintiffs led no evidence that the deceased earned RM30,000 per month.

[7] For the plaintiffs, learned counsel essentially submitted that Edward did have earnings prior to his death to support his dependants because:

(a) Edward was the sole proprietor of SEMS from 25 September 2008 until 1 April 2009;

(b) he was a partner of SEMS until 9 April 2009; and

(c) although he resigned from SEMS on 9 April 2009, all the evidence show that he was the true owner of SEMS.

OUR DECISION

[8] Section 7 of the Act provides for compensation to the family of a person for loss occasioned by his death. Subsection (3) provides:

> (3) The damages which the party who shall be liable under subsection (1) to pay to the party for whom and for whose benefit the action is brought shall, subject to this section, be such as will compensate the party for whom and for whose benefit the action is brought for any loss of support suffered together with any reasonable expenses incurred as a result of the wrongful act, neglect or default of the party liable under subsection (1):
> Provided that —
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> (i) ...
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> (ii) ...
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> (iii) ...
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> (iv) in assessing the loss of earnings in respect of any period after the death of a person where such earnings provide for or contribute to the damages under this section the Court shall:
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> (a) take into account that where the person deceased has attained the age of fifty five years at the time of his death, his loss of earnings for any period after his death shall not be taken into consideration; and in the case of any other person deceased, his loss of earnings for any period after his death shall be taken into consideration if it is proved or admitted that the person deceased was in good health but for the injury that caused his death and was receiving earnings by his own labour or other gainful activity prior to his death;

[9] Pursuant to the above provision, the plaintiffs were entitled to claim for the loss of support. We accepted the submission of learned counsel for the

plaintiffs that the plaintiffs were supported by the deceased and to be able to do that, the deceased must certainly be earning prior to his death. The issue for our determination, though, was not so much whether the deceased was earning at the time of his death but whether the award on the loss of support was correctly made by the learned High Court judge based on the purported earnings of the deceased from the partnership of SEMS.

[10] We found merits in the submissions of learned counsel for the defendants. It was the evidence of the first plaintiff ('SP7') that the deceased was an employee of a company called Jutasama and that on the day of the accident, the deceased was on his way to work at Jutasama (*Rekod Rayuan Jld 3(1) Bhgn D* pp 173–175). The learned High Court judge however failed to consider this particular fact that the deceased was an employee of Jutasama at the time of the accident.

[11] In our view, the plaintiffs' claim for loss of support premised on the purported income of the deceased from the partnership of SEMS was misconceived when in actual fact, the deceased was earning from Jutasama at the material time. If at all there was a claim for loss of support under s 7 of the Act, the plaintiffs' claim ought to have been made for loss of earnings of the deceased from his employment with Jutasama, which the plaintiffs have failed to do. The deceased's loss of earnings had consequently not been proven by the plaintiffs.

[12] Further, it was not in dispute that the deceased had resigned from the partnership four days prior to his death. In his place, his sister SP4 and SP7 were made the partners. SP4 and SP7 had no knowledge of SEMS. The deceased had merely 'borrowed' their names (*Rekod Rayuan Jld 3(1)-Bhgn D* p 143). The reason why the deceased had resigned was to avoid a conflict of interest as Jutasama and the partnership were in the same business of oil and gas. The deceased had ceased to earn from the partnership as at 9 April 2009. In our view therefore, there was no basis to allow the earnings of the deceased from the partnership for the next seven years.

[13] To conclude, we found that the learned High Court judge had erred in law and in fact in allowing the plaintiffs' claim for loss of support premised on the earnings of the deceased from the partnership of SEMS. The appeal was therefore allowed. The order of the High Court was set aside and the order of the sessions court was restored. We made no order as to costs.

Appeal allowed with no order as to costs.

Reported by Afiq Mohamad